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IN THE

Supreme Court of the United States

October Term, 1947.

No. 91. **91**

FOLEY BROTHERS INC. & SPENCER, WHITE & PRENTIS, INC.,

Petitioners,

vs.

FRANK PAUL FILARDO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY.

Brief for Frank Paul Filardo, in Opposition.

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Opinions Below.

The opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (R. 129-131) is reported at 272 A. D. 446. The opinion of the Court of Appeals of New York (R. 132-138) is reported at 297 N. Y. 217.

Jurisdictional Statement.

The judgment of the Court of Appeals was signed on March 11, 1948 (R. 132). The jurisdiction of this Court is invoked under the act of February 13, 1925.

The respondent brought suit in the Supreme Court of New York County, to recover for overtime compensation

for work performed as cook in the building of certain publi works in Iraq and Iran, pursuant to petitioner's contract with the United States, under the Eight Hour Law as amended, for time and a half for all hours worked over eight hours per day (R. 4 and 5). Petitioners' answer denied recovery (R. 6 and 7). The respondent recovered a verdict from the jury on the questions of fact, to wit, the hours worked overtime (R. 85), and a motion to set aside the verdict on questions of fact and law was denied by the Trial Court (R. 86). The motions to dismiss solely on questions of law were denied prior to submission of the case to the jury (R. 81). The petitioners appealed to the Appellate Division, First Department, and raised the same questions of law as raised at the trial, and the Appellate Division reversed judgment of the Trial Term by a three to two decision, solely on the questions of law involved (R. 129-131). Respondent then appealed to the Court of Appeals, State of New York, and the same questions of law were briefed and argued, and the Court of Appeals of the State of New York unanimously reversed the Appellate Division, First Department on all questions of law raised and sent the case back to the Appellate Division, First Department to rule on all questions of fact remaining, if any (R. 137-138). The Appellate Division, First Department then entered an order confirming the finding of facts in the Court below and reinstated the judgment of said Trial Court and making the order of the Court of Appeals the order of the Appellate Division (R. 140).

Questions Presented.

1. Whether the Eight Hour Law, and particularly Sections 324 and 325A, Title 40, U. S. C. has extra-territorial effect outside of the United States, and if this question is answered in the affirmative, then,

2. Whether an employee has a right of action to recover his just overtime pay, either (a) Under the statute, or (b) As a third party beneficiary by reason of the contractual provisions in the contract between the petitioner herein and the United States.

All of these questions were ruled upon by the Court of Appeals and were answered unanimously in the affirmative (R. 132-138).

Statutes Involved.

The statutes involved and to be construed are Sections 324, 325A and 326 of Title 40 of the U. S. C.

Statement.

The facts in this case are not in issue and are therefore undisputed. The respondent, an American Citizen, was a cook and employed in the City of New York, by the petitioners, to work on public projects in Iraq and Iran, in which the petitioners were engaged, in accordance with a contract had with the War Department of the United States Government, during the year 1942 (R. 44, 87, 88). Pursuant to the terms of the employment, respondent was transported from New York to Iraq, arriving there in March 1942, and thereafter was assigned as cook to a camp at Ahwaz, Iran, and in May 1942, when he found out he was not receiving overtime pay for hours worked in excess of eight hours a day, he protested and made a demand for the same, which was disapproved (R. 18, 19). Respondent then was assigned to a camp in Iran and worked there from June 1942 to December 31, 1942, and upon returning to the base in March, filed another claim for overtime (R. 22) and another in New York when he arrived in June (R. 23, 95, 96). Respondent's testimony as to overtime was supported by the assistant foreman of the camp (R. 37-40). At the close of the case, the peti-

tioner moved to dismiss on all the grounds raised herein and on the additional ground that the respondent was not a laborer in the meaning of the Eight Hour Law. Said motions were denied, and the jury awarded a verdict to the respondent in the sum of $2,496.36, for overtime pay, on the basis of 1,172 hours overtime (R. 85).

The third party beneficiary doctrine is involved because the contract that the petitioners had with the United States contained the following clause, that the defendant agreed to "abide by all applicable laws, regulations, ordinances and other rules of the United States of America of the States, territory, all political subdivisions thereof, or any other duly constituted public authority wherein the work is done" (R. 98).

Argument.

It is respondent's contention that the writ should not be granted, as the decision below is eminently correct and sound in accordance with previous decisions of this Court and other jurisdictions; and further on the ground that if this Court is of the opinion that the Eight Hour Law is applicable extra-territorially, then the judgment of the Court below cannot be disturbed as respondent was granted judgment in any event on the third party beneficiary theory. This being a question of local law is not reviewable under the Rules of this Court. However, since the petitioner raises these three points again, an answer on the merits will be made to each.

1. *Extra-territoriality*: That the Eight Hour Law has extra-territorial effect is reasoned from the wording of the act itself and upon the previous decisions of competent authority. There is no question that Congress has the power to prescribe rates of pay wherever work is performed on public contracts, and this is admitted by the petitioner (footnote, p. 12 of Petitioners' Brief). The act under consideration states as follows:

> "*Every* contract made to which the U. S. • • • is a party and every such contract made for or on behalf of the U. S." (Sec. 324). (Italics ours.)

This clearly embraces all contracts made within or without the United States. In fact, the Court below in its opinion stated:

> "Words of such inclusive reach cannot properly be read to exclude contracts for government jobs abroad" (R. 136).

Furthermore, the opinion of the Attorney General in *25 Op. A. G. p. 441*, directly passed upon this question concerning American employees with respect to such laborer and mechanic, and held the Eight Hour Law to have extra-territorial effect. The attempt of petitioners to differentiate the facts of that case and to suggest that the Republic of Panama (where the work was performed) was similar to a possession of the United States and not a foreign territory, is not borne out by the opinion which states in so many words:

> "The case stands so far as the applicability of the act of 1892 is concerned (the 'Eight Hour Law' in existence at that time), exactly as if the territory were beyond the legislative powers of the U. S." (Parentheses ours.) (p. 444.)

Furthermore, the Department of Labor, in a letter dated October 16, 1946, in response to an inquiry, answered the question in the affirmative, to wit, that the Eight Hour Law is applicable to an American Citizen working in a foreign country.

The petitioner in support of its contention cites the opinion of the Attorney General in *34 Op. A. G. 257*, which holds that alien laborers working on Public Contracts

outside of the United States are not covered by the Eight Hour Law. This opinion is in no way contradictory to that of Attorney General Moody in 25 Op. A. G. 441, and moreover said opinion cites with approval the opinion of Attorney General Moody limiting it to American citizens working on Public Contracts outside of the United States. The attempt therefore, of the petitioner in its brief to give the impression that Attorney-General Stone decided contrary to the previous opinion, is not borne out by the reading of the opinions. Also *Matter of Post* v. *Burger & Gohlke*, 216 N. Y. 544, 549; *Industrial Comm.* v. *McCartin*, 330 U. S. 622, 626; *Alaska Packers Assn.* v. *Industrial Accident Comm.*, 294 U. S. 532, 542-543; cf. *Levy* v. *Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333.

The case of the *American Banana Company* v. *The United Fruit Company*, cited by petitioners, in support of its contention, is not in point, in that the facts in that case were that the Sovereign State of Costa Rica had violated the Sherman Anti-Trust Law, by acts performed by it in Costa Rica, thereby causing damage to plaintiff. This Court held that as between two sovereign states, to wit, State of Costa Rica and the United States, matters such as these must be handled through diplomacy. In the case at bar, the acts complained of are performed by citizens of the United States, over whom Congress has full authority to legislate. The references by petitioners to the Bacon-Davis Act, The Fair Labor Standards Act and the Walsh-Healey Act, on the contrary, support the finding of the Court below, as these acts contained specific restrictions as to where and how the Acts are applicable geographically, which restrictions are totally absent in the Act in question.

2. *Right of Employee to Sue Under the Statute*: The history of the Eight Hour Law, as cited by the Court below, is that the first statute was enacted in 1868 and then

re-enacted in 1892, which acts merely specified the maximum amount of hours to be worked a day on public works and provided for penalties and criminal sanctions in the event of violation. Amendments were supplied in 1912 which appear today as Sections 324-325 of Title 40 of the U. S. C. In 1917, Congress passed a law suspending the operation of the eight hour limit, as a war measure, provided that time and a half would be paid for overtime, and prior to the outbreak of the recent World War this latter provision was continued in Section 326. Thereafter and in 1940, Section 325A was enacted which suspended Section 326, and is the present statute to be construed (R. 133). This new provision again provided that all work in excess of eight hours per day on public works be permitted upon compensation of time and a half for the overtime.

The cases cited by the petitioner, to wit: *United States* v. *Martin*, *U. S.* v. *Moses*, *Timmonds* v. *The U. S.*, *Coleman* v. *U. S.*, were all cases decided prior to 1917, that is prior to the time that a basic rate of pay for overtime work was provided for laborers and mechanics under the statute, and a reading of those cases will show that the decisions in all those cases denying the right of an employee to sue under the statute was based upon the specific holding that there was no provision in the Eight Hour Law, as to the rate of pay for overtime. In fact it was this reasoning of this Court in the case of *The United States* v. *Post*, 148 U. S. 124, which led this Court to hold that the Letter Carrier's Act of 1888, which provided for a rate of overtime to be paid to postal employees, was the distinguishing feature in permitting postal employees to recover time and a half under the Eight Hour Law and the Court below so stated in its opinion, when it said "So read the statute differs little from the Letter Carriers Act (25 U. S. Stat. 157; Ch. 308), which has been interpreted to bestow a right to sue upon employees within its coverage (see *U. S.* v. *Post*, 148 U. S. 124)".

Furthermore, on this point, the Court below states as follows:

> "While the statute does not in so many words grant to the employee a cause of action if such compensation is not received, it is settled that such remedial legislation is to be given a liberal construction to effectuate its purpose and aim. (See *National Labor Relations Bd.* v. *Hearst Publications*, 322 U. S. 111, 129; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 259-260; *Warner* v. *Goltra*, 293 U. S. 155, 158; *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945.)" (R. 134.)

Moreover, the statute itself provides that overtime work is to be permitted upon "compensation" and the Court further went on to say that this was manifestly an affirmative direction, that overtime work shall be paid and collected in excess of the statutory limit on the basis of time and a half. The Court below further held that even though a statute does not explicitly provide for a remedy, that where a statute was manifestly passed for the benefit and protection of a laborer, the party who has suffered from this violation of duty has a cause of action. *Abounader* v. *Strahmeyer & Arpe Co.*, 243 N. Y. 458, 465; see, also, *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 751; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447, 456-458 (R. 135).

The Court below has aptly put the incongruity of petitioners' contention when it said:

> "With the beneficial purposes of the statute so manifest, if plaintiff may not sue to enforce it, the benefits accorded would indeed be empty and illusory. He would find himself in the position of having been given a benefit he is unable to enjoy, a right he is helpless to enforce" (R. 135).

Also *McNulty* v. *City of New York*, 238 N. Y. 29; *City of Phoenix* v. *Drinkwater*, 46 Ariz. 470; cf. *Austin* v. *City of New York*, 258 N. Y. 113; *Campbell* v. *City of New York*, 128 Misc. 382).

The comparison by the petitioners of the Eight Hour Law with the Bacon-Davis Act, Fair Labor Standards Act, Walsh-Healey Act and the Portal to Portal Pay Act, rather sustains the opinion of the Court below as these Acts are specific with regard to the method of recovery by employees and provide special remedies over and above the ordinary right of a party to sue for the benefits of an act under the general law. The mere fact that the Portal to Portal Act did not restrict recovery under the Eight Hour Law, clearly permits recovery under the general law.

3. *The employee's right to sue as third party beneficiary*: It is respondent's contention that with regard to this doctrine, this being purely of local law and Court below having in any case sustained the right of recovery of the judgment as a third party beneficiary (*Lawrence* v. *Fox*, 20 N. Y. 268, *Seaver* v. *Ransom*, 224 N. Y. 233), this Court in accordance with its rules cannot disturb the verdict even though it should disagree with the Court below on the previous question of the right of the employee to sue under the statute. *Williams* v. *Kaiser*, 323 U. S. 471; *Atchison T. & S.* v. *Railroad Commission of State of California*, 283 U. S. 380; *Scott* v. *Platt*, 137 P. 2nd 975.

However, even on the merits, the Court below was correct in holding the respondent to be entitled to recovery under the third party beneficiary doctrine even under Federal Law by reason of the pertinent clause in the contract (R. 98). *German Alliance Insurance Co.* v. *Home Water Co.*, 226 U. S. 220, 230; *Robins Dry Dock and Repair Co.* v. *Flint*, 275 U. S. 303, 307, when it stated as follows:

> "In our view, that agreement when related to the statute, was, in effect, a promise to pay their

> workers such extra compensation for overtime work, and, entitled an aggrieved laborer or mechanic to enforce that promise as a third party beneficiary. (See *United States* v. *Morley Constr. Co.*, *supra*, p. 789; *Crabb* v. *Welden Bros.*, 65 Supp. 369, 377; see, also, *Seaver* v. *Ransom*, *supra*, p. 238; *Fata* v. *Healy Co.*, 289 N. Y. 401; *Stong* v. *American Fence Constr. Co.*, 245 N. Y. 48; *Novosk* v. *Reznick*, 323 Ill. App. 544.)" (R. 137.)

The basis of petitioners' argument that the Eight Hour Law was not intended for the direct benefit of "laborers and mechanics" concerning whom the Act sought to cover is contradicted by its own previous citation in its brief on page 12, in 34 Op. A. G. 257, wherein petitioners quote as follows:

> "The purpose of the statute under consideration (*i. e.* the Eight Hour Law) is for the improvement of labor conditions."

How then can petitioners argue in the same breath that the Eight Hour Law is to improve labor conditions and yet claim that the statute is not for the benefit of laborers and mechanics mentioned in the act? In fact, a study of the whole history of all labor legislation shows that the laws were enacted solely to benefit the working man and to raise his standard of living. If he has worked and cannot recover for his work so that his standard of living can be improved, the statutes are of no benefit to him. It might just as well have never been passed.

With respect to the correctness and the force of the entire opinion below, it is but necessary to quote the opinion of a recent case under the Eight Hour Law, just decided in the United States District Court of Massachusetts, that of *Veader* v. *Bay State Dredging* and reported now only in 17 Law Weekly 2020, wherein Judge Ford stated:

"There is no need to repeat here the reasoning of this case (*Filardo* v. *Foley Bros.*, 297 N. Y. 217). I agree with the reasons advanced for concluding that a cause of action is given by statute." (Parentheses ours.)

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

August 1948.

Respectfully submitted,

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